

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES S. GORDON, et. al.

Plaintiffs,

-vs-

FIRST PREMIER BANK, INC.
et. al.,

Defendants.

NO. CV-08-5035-LRS

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS

BEFORE THE COURT is Defendants' Motion to Dismiss, Ct. Rec. 5, filed August 13, 2008. The Court heard oral arguments on October 21, 2008 but stayed the case pending identical causes of action before the Ninth Circuit Court of Appeals. The Court having lifted the stay in this case on December 21, 2009 and having considered the written and oral arguments of counsel and pro se Plaintiff, Defendant First Premier Bank's "Third Status Report and Request for Dismissal" (Ct. Rec. 33) and the dispositive effect of the appellate decision in *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040 (9th Cir.2009) ("*Virtumundo*"), the Court hereby enters this Order.

Importantly, the Ninth Circuit Court of Appeals in *Virtumundo* held: 1) Gordon lacks standing as a bona fide Internet access service

1 provider suffering appropriate adverse effects; and 2) CAN-SPAM Act¹
2 preempts Gordon's state law claims to the extent they allege more than
3 fraudulent conduct.

4 This Court found in a similar case (*Gordon v. Commonwealth*
5 *Marketing Group, Inc.*, NO. CV-08-5074-LRS) that based on the Ninth
6 Circuit's reasoning in *Virtumundo*, Gordon lacked standing for his CAN-
7 SPAM Act claim. Gordon's state claims under the Commercial Electronic
8 Mail Act ("CEMA"), Chapter 19.190 RCW, were also found by this court
9 to be preempted as Gordon has not adequately pleaded nor developed the
10 record to allege fraud as part of his CEMA claim.

11 *Pro se* plaintiff Gordon has had a full and fair opportunity with
12 the assistance of counsel to litigate issues in *Virtumundo*, which are
13 identical to those presented in this lawsuit. Despite the extensive
14 record in *Virtumundo* and a fair opportunity to make his arguments,
15 Plaintiff has failed to convince this court or the Ninth Circuit that
16 he is an internet access service with standing to bring a private
17 action under CAN-SPAM. *Virtumundo*, 575 F.3d at 1048 ("We agree that
18 Gordon lacks standing to bring a private action under the CAN-SPAM
19 Act").

20 With respect to Plaintiff's CEMA and Consumer Protection Act
21 ("CPA") claims, the Ninth Circuit Court of Appeals affirmed the
22 Western District's dismissal of Plaintiff's claims:

23 The CAN-SPAM Act established a national standard, but left
24 the individual states free to extend traditional tort

25
26 ¹Controlling the Assault of Non-Solicited Pornography and Marketing
("CAN-SPAM Act").

1 theories such as claims arising from fraud or deception to
2 commercial e-mail communication . . .

3 As stated by our district court, Gordon's claim is "for, at
4 best, 'incomplete' or less than comprehensive information"
5 regarding the sender. (Cite omitted.) Such technical
6 allegations regarding the header information find no basis
7 in traditional tort theories and therefore fall beyond the
8 ambit of the exception languages in the CAN-SPAM Act's
9 express preemption clause

10 In sum, Gordon's alleged header deficiencies relate to, at
11 most, nondeceptive statements or omissions and a heightened
12 content or labeling requirement. Regardless of the merits of
13 his arguments, assuming they are actionable under CEMA, such
14 state law claims falter under the weight of federal
15 preemption. Summary judgment was properly entered on
16 Gordon's CEMA claims.

17 *Virtumundo*, 575 F.3d at 1063-64.

18 Plaintiff's claims in *Virtumundo* and this case are identical.
19 Plaintiff's CPA claim is dependent on his pre-empted CEMA claim.
20 Complaint, ¶ 17. The Ninth Circuit affirmed the district court's
21 dismissal of Plaintiff's CEMA and CPA claims:

22 Because his CEMA claims fail as a matter of law, his CPA
23 claims, to the extent grounded in CEMA violations, are
24 likewise inadequate and were properly dismissed.

25 To the extent that Gordon also brings independent CPA
26 claims, they too fail. Gordon has failed to identify an act
or practice that "misleads or misrepresents something of
material importance."

Virtumundo, 575 F.3d at 1065.

All of the above claims were identical to the claims Plaintiff Gordon
alleges in this lawsuit, and all were rejected by the Western District
and the Ninth Circuit.

Accordingly, **IT IS ORDERED** that:

1. Defendants' Motion to Dismiss, **Ct. Rec. 5**, is **GRANTED**. All
claims against Defendants are dismissed with prejudice.

1 a. Plaintiff's First Cause of Action for violations of the
2 Washington Commercial Electronic Marketing Act, RCW 19.190, et seq.
3 claim fails because it is preempted by the federal Controlling the
4 Assault of Non-Solicited Pornography and Marketing Act of 2003, 15
5 U.S.C. §§ 7701 et seq., and because he failed to plead with
6 particularity as required by FED. R. CIV. P. 9(b).

7 b. Plaintiff's Washington Consumer Protection Act, RCW 19.86, et
8 seq., claim fails because it arises from his failed CEMA claim.

9 c. Plaintiff's CAN-SPAM claim fails because Plaintiff lacks
10 standing and because he failed to plead with particularity as required
11 by FED. R. CIV. P. 9(b).

12 2. Plaintiff's Motion for Partial Summary Judgement, **Ct. Rec.**
13 **30**, which Plaintiff filed on December 3, 2009, during the temporary
14 stay, is **DENIED as MOOT** based on the dismissal of all claims against
15 defendants as set forth above.

16 **IT IS SO ORDERED.** The District Court Executive is directed to
17 enter this Order and judgment accordingly, provide copies to counsel,
18 pro se Plaintiff and close this file.

19 **DATED** this 21st day of December, 2009.

20 ***s/Lonny R. Suko***

21 _____
22 LONNY R. SUKO
23 CHIEF UNITED STATES DISTRICT JUDGE
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